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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-____ 77-477

JOE S. HOPPER, WARDEN,
GEORGIA STATE PRISON,

Petitioner,

v.

TYRONE BARNETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TYRONE BARNETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, Joe S. Hopper, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 10, 1977, rehearing en banc denied on June 27, 1977.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 548 F. 2d 550 (5th Cir. 1977). A copy of the opinion is attached hereto as Appendix A.

The opinion of the District Court for the Southern District of Georgia is unreported; a copy of the opinion appears herein as Appendix B.

JURISIDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 10, 1977. A timely petition for rehearing and rehearing en banc was denied on June 27, 1977. See 555 F. 2d 1391. This petition for certiorari is taken within ninety days of that date. 28 U.S.C. § 2101(c). The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1.

For purposes of equal protection analysis is wealth always a suspect classification simply because the issue arises in the context of the criminal justice system?

2.

Although there may be some uncertainty as to whether a defendant has the ability to pay a fine (and it subsequently appears that he cannot pay the fine because of indigency), does the Equal Protection Clause of the Fourteenth Amendment preclude the imposition of a probated sentence conditioned upon the payment of a fine based upon factors which include assessments as to the ability of the defendant to successfully serve a term of probation if a fine is paid first?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, ART. 14, SEC. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

GA. CODE ANN. § 27-2529 (1972 REV.):

In any case where the judge may, by any law so authorizing, place on probation any person convicted of a felony, such judge may in his discretion fine such person so convicted not more than $2,000 as a condition to such probation: Provided, such defendant shall not be entitled to any rebate or refund of any part of such fine so paid, in any case such probation shall be revoked by law.

GA. CODE ANN. § 27-2709 (1972 REV.):

* * * *

If it appears to [the] court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay and suspend the execution of such sentence or any portion thereof, and may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation.

* * * *

The court may, in its discretion, require the payment of a fine or cost or both as a condition precedent to probation.

STATEMENT OF THE CASE

In 1973, the respondent, Tyrone Barnett, and a codefendant were charged with armed robbery in the Superior Court of Liberty County, Georgia. Pursuant to plea negotiations with retained counsel, the district attorney recommended to the trial court that, upon pleas of guilty, a ten year probated sentence conditioned on the payment of a $2,000 fine be imposed on each defendant.

Barnett and his codefendant represented that the fines would be paid and contacted their respective families. The pleas were entered and Barnett was sentenced in accordance with the recommendation.

The codefendant received the same sentence. His fine was paid and he was released to probation. For some unexplained reason, the funds that Barnett thought would be forthcoming were not. His fine was not paid and he began serving the ten year sentence.[1]

Barnett unsuccessfully sought habeas corpus relief in the state courts. Barnett v. Hopper, 234 Ga. 692, 217 S.E. 2d 280 (1975); see also, Barnett v. State, 231 Ga. 741, 204 S.E. 2d 296 (1974).

---

[1] During the pendency of the case in the lower federal courts, Barnett was paroled.

The federal district court also denied relief in an unreported opinion. See Appendix B. The Fifth Circuit Court of Appeals reversed on the basis that "imprison[ing] an indigent when in the same circumstances an individual of financial means . . . remain[s] free constitutes a denial of equal protection of the laws." Barnett v. Hopper, 548 F. 2d 550, 554 (5th Cir. 1977). Rehearing en banc was denied on June 27, 1977, after a poll of the court. 555 F. 2d 1391.

REASONS FOR GRANTING THE WRIT

I. THE PETITION PRESENTS AN IMPORTANT QUESTION CONCERNING THE EXTENT TO WHICH THE EQUAL PROTECTION ANALYSIS OF RECENT DECISIONS SUCH AS MAHER V. ROE, ___ U.S. ___ (1977), SHOULD APPLY IN CASES WHERE THE EQUAL PROTECTION ISSUE ARISES IN THE CRIMINAL JUSTICE SYSTEM.

As recognized in Maher v. Roe, ___ U.S. ___, 97 S. Ct. 2376 (1977), financial need in and of itself has never been sufficient to create a suspect class for purposes of traditional equal protection analysis. It was inferred, however, that equal protection issues arising in the context of the criminal justice system are perhaps analyzed differently. Id. at ___ n. 6, 97 S. Ct. at 2381.

The rationale of Maher on the "suspect class" issue was that all manner of state action, through a vast body of statutes and regulations, may sometimes impose greater hardships on the poor than on the rich. Maher, of course, relied on San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), and Dandridge v. Williams, 397 U.S. 471 (1970).

The petitioner suggests that the fact that an equal protection issue arises in the criminal justice system is no basis upon which to utilize a different type of analysis. Whatever the "state action" -- health, education, taxation, public safety (including the criminal justice system), et al. -- the truism of Maher is present.

If the same type of equal protection analysis should be utilized in cases arising in the criminal justice system, perhaps Griffin v. Illinois, 351 U.S. 12 (1956), Douglas v. California, 372 U.S. 353 (1963), and similar cases can be read as requiring the state regulation or statute to pass the test of strict judicial scrutiny (or compelling interest test) and not the lesser test of only rationally furthering a legitimate state purpose. Griffin and Douglas can be read as employing the stricter test because in large measure a meaningful first stage appeal determines if the panoply of constitutional rights enjoyed by the defendant has been afforded him; a meaningful appeal thus at least indirectly promotes the implementation of basic constitutional rights. Cf. Ross v. Moffitt, 417 U.S. 600, 611-612 (1974).

In the case sub judice, however, apart from the equal protection issue, no other constitutional rights are implicated in the plea of guilty to the charge of armed robbery. For instance, it has never been suggested that the plea of guilty was involuntary or that counsel was ineffective. The petitioner therefore suggests that the application of Ga. Code Ann. § 27-2529 (1972 Rev.) need only rationally further a legitimate state purpose.[2]

The decision of the Court of Appeals is really devoid of analysis in terms of the equal protection issue. The panel simply concluded that wealth was a suspect classification and went no further. This case would be an appropriate one in which to test that bald conclusion in the context of a case arising in the criminal justice system.

---

[2] Whether the application of § 27-2529 in this case rationally furthers a legitimate state interest and why that issue should merit certiorari review is discussed infra.

II. THE ABILITY OF A DEFENDANT TO PAY A FINE IS OFTENTIMES A CRITICAL FACTOR IN THE DECISION OF A TRIAL JUDGE IN DETERMINING WHETHER THE DEFENDANT IS LIKELY TO SUCCESSFULLY SERVE A TERM OF PROBATION.

Of concern to the Court in Tate v. Short, 401 U.S. 395 (1971), Morris v. Schoonfield, 399 U.S. 508 (1970) and Williams v. Illinois, 399 U.S. 235 (1970) was the absence of the furtherance of any valid penal objective by the state statute in question that converted a fine into a term of imprisonment for failure to pay the fine. Tate v. Short, supra, 401 U.S. at 399; Williams v. Illinois, supra, 399 U.S. at 242. Probation, as opposed to a fine that only raises revenue, does further the penal objectives of a state. The probationer is maintained under close supervision until it is deemed that he can become a constructive member of society without such supervision.

Probation is an integral tool in the rehabilitation of the convicted felon. Of course, many factors are present in determining whether the convicted felon should be released on probation or parole. The decision to place the convicted felon on probation is therefore not one to be entered into lightly, especially if the defendant has been convicted of a serious crime such as armed robbery. It is unquestioned that the trial judge is vested with a wide discretion in sentencing matters in order that an appropriate punishment can be molded to fit "the countless variety of situations that appear." Williams v. Illinois, supra, 399 U.S. at 243.

Viewed from the perspective of the state trial judge at the time of sentencing in this case, the sentence which resulted was quite reasonable, as well as appropriate to the circumstances of the particular case and the individual involved. Of critical significance is that the sentence imposed and the sentence challenged here was based on an unqualified representation that a fine could be paid by the person seeking probation. It would be impossible at this point in time to reconstruct each of the considerations which entered into the judge's decision to place Barnett on probation on the condition that he pay a fine, but the fact that he assured the sentencing court that he could pay the fine had to be one of them.

Before a sentencing judge makes a decision to probate a sentence, he must determine whether the particular defendant is a good probation risk. Specifically, the judge must decide that the individual defendant is not likely to engage in a continuing course of criminal conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law. It was the state judge's determination in this case, on the basis of the representation made to him, that Barnett would be a good probation risk should he first pay the fine that was imposed.

The fine aspect of the judgment simply does not place Barnett in a position where he is suffering disparate treatment based solely on wealth. On the issue of probation, the fine and ability to pay the fine provided assurances to the trial judge that the probation would be successful. A trial judge, upon receiving a representation that a family member would be willing and able to pay the fine, knows that added control over the sentence is provided by the interest of the family and the belief of the family that the defendant can successfully serve the period of probation.

Further, the payment of a fine places upon a given probationer a greater responsibility in successfully serving the period of probation than not paying a fine or paying a fine over the entire period of the sentence. In Georgia, if a breach of probation occurs, the fine money is lost and the only credit the defendant receives is that for the time spent on probation. Ga. Code Ann. § 27-2529, (1972 Rev.). Succinctly, the fine feature of the probation sentence does not result in disparate treatment on the basis of wealth, but on acceptable considerations stemming from the fact that an accused has assured the sentencing court that he can and will pay a fine. As noted, a commitment by a trial court to impose a probated sentence in a serious crime such as armed robbery must always be a close and difficult question; if a defendant's willingness to pay a fine is a factor which provides the court added assurance that the individual is a good risk for probation, the subsequent or later developed fact that the individual cannot pay the fine materially alters the original considerations which went into the judgment.

In such a case the judgment has already been made for the defendant -- if the fine cannot be paid, he must serve his time within the confines of the penitentiary.

Ga. Code Ann. §§ 27-2529, 27-2709 (1972 Rev.) on their face obviously foster a legitimate state purpose -- the rehabilitation of offenders outside the confines of a penitentiary. For the reasons noted above, in some instances the ability of the defendant to pay a fine can be an important factor in assessing his ability to complete a term of probation. The imposition of a fine thus furthers the rehabilitative purpose. Stated in another, somewhat hypothetical fashion, a wealthy defendant may be a bad probation risk because of other factors, but the fact that he is wealthy and can pay a fine should be an indicator that he will not return to a life of crime out of economic necessity. The same cannot necessarily be said of the indigent defendant -- he may be a good probation risk for other reasons, but his lack of family financial support or unemployment (and consequent inability to pay a fine) is some indication that he might return to crime out of necessity. Generally it is only the close case where the ability to pay a fine will be the determinative factor but in those cases the decision to impose a lump sum fine[3] cannot be said to be invidious discrimination.

---

[3]As noted above, in Georgia the fear of losing the entire sum upon revocation adds a greater measure of control than installment payments.

The indigent defendant may sometimes feel ensnared in a Catch-22 poverty cycle, but simply because the cycle is regretable and unfortunate does not necessarily mean that the defendant has suffered an equal protection violation.

The facts here go far beyond the "$30.00 or 30 days" factual context of the cases where the raising of revenue was the overriding state interest. Cf. Tate v. Short, supra; Morris v. Schoonfield, supra; Williams v. Illinois, supra. For this reason, and as trial judges across the nation face the same difficult problems as the trial judge in this case, the petitioner submits the case is worthy of certiorari review.

CONCLUSION

For the above and foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX "A"

Tyrone F. BARNETT,
Petitioner-Appellant,

v.

Joseph S. HOPPER, Warden,
Respondent-Appellee.

No. 76-3230
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

March 10, 1977.

Georgia prisoner sought habeas corpus relief from allegedly unconstitutional sentence. The United States District Court for the Southern District of Georgia, Anthony A. Alaimo, Chief Judge, denied relief, and petitioner appealed. The Court of Appeals, Clark, Circuit Judge, held that although penalty imposed, i. e., ten-year probated sentence conditioned on payment of fine, was the same as that recommended by prosecutor in plea bargaining agreement the guilty plea did not waive any constitutional attack on imposition of active prison sentence when anticipated funds for immediate payment of the fine were not forthcoming, that to imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection, that sentence imposed was unconstitutional and sentence was to be reformed to eliminate the wealth-indigency factor or defendant, seeking to have requirement of immediate payment modified to permit reasonable installment payments, was to be allowed to replead.

Reversed and remanded with directions.

1. Criminal Law ⇐273.4(1)
Fines ⇐11

Guilty plea did not constitute waiver of Georgia defendant's right to raise constitutional consequences which flowed from his inability to pay fine imposed as condition of probated sentence, specifically, defendant should have been permitted to make reasonable installment payments and should not have been imprisoned when he could not immediately pay fine, notwithstanding that a probated sentence conditioned on payment of fine was part of plea bargain. Code Ga. §§ 27-2529, 27-2709; U.S.C.A.Const. Amend. 14.

2. Criminal Law ⇐273.4(1)

While a guilty plea, and any plea bargain which underlays it, constitutes a break in the chain of events which has preceded it and operates as a waiver of defects occurring before the plea was entered, it does not waive any constitutional attack on a subsequent sentence merely because the sentence accords with the plea agreement. U.S.C.A.Const. Amend. 14.

3. Criminal Law ⇐273.1(2)

A plea bargain is not a sentence contract but is merely an agreement by a defendant to plead guilty in exchange for a suggestion by the prosecutor that the judge impose a certain sentence; even if the recommendation is followed there still does not arise the type of quid pro quo that is present in the guilty plea itself and its waiver of previous constitutional violations.

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

JUL 7 1977
Betty W. Hack

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4. Criminal Law ⇐1208(2)

Trial judges have broad discretion in fixing punishment.

5. Constitutional Law ⇐250.3(1)

To imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection. U.S. C.A.Const. Amend. 14.

6. Constitutional Law ⇐270
Criminal Law ⇐982.6(4)

Although sentence imposed on Georgia defendant, i. e., ten-year probated sentence conditioned on payment of fine, was the same as that recommended by prosecutor in connection with plea bargain, it was a violation of due process to sentence defendant to ten years' imprisonment when anticipated funds for immediate payment of fine were not forthcoming; defendant, seeking modification of immediate payment requirement to provide for reasonable installment payments, was entitled to have sentence reformed so as to eliminate the wealth-indigency factor or defendant was to be allowed to replead. Code Ga. §§ 27-2529, 27-2709; U.S.C.A.Const. Amend. 14.

Appeal from the United States District Court for the Southern District of Georgia.

Before GOLDBERG, CLARK and FAY, Circuit Judges.

CLARK, Circuit Judge:

Petitioner Tyrone Barnett seeks habeas corpus relief from his May 1973 Georgia state conviction for armed robbery. After Georgia courts denied him the relief sought, so did the United States District Court for the Southern District of Georgia. Finding Barnett's claim for relief to be meritorious, we reverse.

Barnett and a codefendant were charged in 1973 with armed robbery. Their retained attorney reached an agreement with the prosecutor that in exchange for their guilty pleas, the prosecutor would recommend that the court impose a ten-year probated sentence conditioned on the payment of a $2,000 fine and court costs by each defendant. The statutory basis for the sentence is Ga. Code Ann. § 27-2709 (1972), which states "[t]he court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation." Section 27-2529 establishes $2000 as the maximum permissible fine. Prior to the plea, arrangements were made by the defendants with their families for the payment of the fines. Each entered a guilty plea; the codefendant paid his fine and received probation. For some reason which the record before us does not explain, the funds Barnett anticipated would be available could not be raised. When this occurred he was sentenced to ten years' imprisonment.

[1-3] Barnett now contends that this sentence, which concededly was in accord with his agreement, should not have been conditioned upon an immediate payment of the bargained-for fine. He seeks to have the requirement of immediate payment modified to permit a reasonable installment payment schedule. Since the trial judge was accepting a plea bargained between the prosecutor and the defendants in imposing this sentence, the State argues that any possible impropriety has been waived.

We cannot agree that Barnett's plea constitutes a waiver of his right to raise the constitutional consequences which flowed from his subsequent inability to pay. In *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747

(1970); *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); and *Parker v. North Carolina*, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970), the Supreme Court dealt with the effect of a plea of guilty on a subsequent attack on claimed violations of constitutional rights. *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973), summarized the conclusions of the *Brady* trilogy thus:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior* to the entry of the guilty plea. [Emphasis supplied]

As the *Tollett* court added, "[t]he focus of federal habeas inquiry is the nature of the advice [given by an attorney] and the voluntariness of the plea, not the existence as such of an *antecedent* constitutional infirmity." 411 U.S. at 266, 93 S.Ct. at 1608 (emphasis supplied). Our decisions have similarly limited waiver to defects occurring before the guilty plea was entered. *Broxson v. Wainwright*, 477 F.2d 397 (5th Cir. 1973); *Traber v. United States*, 466 F.2d 483 (5th Cir.), *cert. denied*, 409 U.S. 1044, 93 S.Ct. 542, 34 L.Ed.2d 495 (1972); *Waddy v. Davis*, 445 F.2d 1 (5th Cir. 1971). The constitutional violation which Barnett urges was the imposition of an improper sentence because of changed circumstances occurring *after* the guilty plea. *See Lefkowitz v. Newsome*, 420 U.S. 283, 288, 95 S.Ct. 886, 889, 43 L.Ed.2d 196 (1975). While the guilty plea, and any plea bargain which underlay it, constitutes a "break in the chain of events which has preceded it," *Tollett v. Henderson, supra* at 267, 93 S.Ct. at 1608, it does not waive any constitutional attack upon a subsequent sentence merely because that sentence accords with the defendant's agreement.

The district judge held that the doctrine of *volenti non fit injuria* applied. The thrust of this position is that since Barnett agreed to the imposition of the sentence, he may not rue back the bargain. Though there is merit to the argument as an abstract principle, it loses its force when applied to produce constitutionally impermissible confinement. Moreover, the plea bargain is not a sentence contract. It is expressly limited to an agreement by the defendant to plead guilty in exchange for a *suggestion* by the prosecutor that the judge impose a certain sentence. Even if the recommendation is often or usually followed, there still does not arise the type of *quid pro quo* that is present in the guilty plea itself and its waiver of previous constitutional violations. The trial court had to make an affirmative, independent decision to impose the sentence that was the result of plea bargaining. He also decided to permit the allegedly unconstitutional imprisonment to take place when Barnett's inability to pay a fine later arose. The court's choice to impose and enforce the sentence recommended is not so intimately a part of Barnett's plea bargain as to remove it from constitutional inspection. The question of the propriety of the sentence is properly before this court.

It is uncontroverted on this record that Barnett believed his fine would be paid. We expressly pretermit any ruling on the legitimacy of a sentence of imprisonment that is imposed upon a defendant who affirmatively agrees to incarceration in lieu of payment of a fine. If a strict adherence to contract law principles would indicate that Barnett

should be bound to imprisonment in the event impecuniousness prevented his financial performance, such a contractual approach still could not be squared with the constitutional doctrine established by the *Williams-Morris-Tate* line of decisions. Barnett's agreement to this unconstitutional condition was predicated on his mistaken belief the fine would be paid, thus it is clearly distinguishable from the case of a defendant who explicitly agrees to a recommended period of imprisonment in exchange for a plea.

[4] We note at the outset of our consideration of the merits that the State is correct in arguing that, on their facts, the Supreme Court precedents are distinguishable from the present situation. In *Williams v. Illinois*, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), the Court held that an individual unable to pay a fine could not constitutionally be incarcerated beyond the maximum duration fixed by statute. The Illinois defendant had been sentenced to the maximum confinement and then required to remain 101 days further to satisfy at $5 per day his $505 fine and court costs. On the same day, the Court in *Morris v. Schoonfield*, 399 U.S. 508, 509, 90 S.Ct. 2232, 2233, 26 L.Ed.2d 773 (1970) (concurring memorandum opinion), vacated a conviction and remanded it for reconsideration in light of *Williams v. Illinois*. Justice White, with three other justices concurring, opined that an indigent could not be imprisoned for failure to pay a fine immediately, regardless of whether this resulted in incarceration for a term longer than the maximum permitted under statute. This was based on the view that the constitution forbade converting a fine into a sentence due to immediate financial inability to pay. The next term in *Tate v. Short*, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), the Court adopted the language from the *Morris* concurrence stating the broad proposition that imprisonment for failure to pay a fine immediately is improper. As the State here points out, however, *Tate* dealt with a conviction in a Texas court empowered to impose only fines. If a defendant could not pay the fine, it was converted into a prison sentence. The court further stated:

> Imprisonment in such a case is not imposed to further any penal objective of the State. It is imposed to augment the State's revenues but obviously does not serve that purpose; the defendant cannot pay because he is indigent and his imprisonment, rather than aiding collection of the revenue, saddles the State with the cost of feeding and housing him for the period of his imprisonment.

Id. at 399, 91 S.Ct. at 671. Admitting the broad discretion granted trial judges in fixing punishment, the *Tate* court stated that once the determination is made that imprisonment is unnecessary and a fine would suffice, imprisonment could not then be imposed for inability to pay that fine. Finally the court stated that other methods, payment by installment being the only one specifically noted, *id.* at 400 n. 5, 91 S.Ct. at 671 n. 5, have been utilized and were constitutionally permissible. In *Williams v. Illinois*, the Court also referred to satisfaction of the fine by work performed after a probationer/parolee has been released from incarceration. 399 U.S. at 244 n. 21, 90 S.Ct. at 2024 n. 21. As the Supreme Court indicated in *Williams v. Illinois, id.* at 244–245, 90 S.Ct. at 2024:

> The State is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones. [Footnote omitted.]

[5] This court has not interpreted the *Williams-Morris-Tate* line of cases to be limited to their precise facts. When a defendant is imprisoned for financial inability to pay a fine immediately, he is treated more severely than a person capable of paying a fine immediately. The sole distinction is one of wealth, and therefore the procedure is invalid. *Frazier v. Jordan*, 457 F.2d 726 (5th Cir. 1972). Though *Frazier* was based on the proposition that wealth is a "suspect classification" and such a conclusion has since been drawn into question by such authority as *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973) (plurality opinion of four justices), the basic principles remain sound. To imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws. *See also Burton v. Goodlett*, 480 F.2d 983 (5th Cir. 1973).

As did the *Frazier* decision, we too abstain from drawing into question the imprisonment of a defendant who, though capable of paying a fine, refuses or neglects to do so. As the Court further stated:

> "Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case." *Tate v. Short*, 401 U.S. at 400–401, 91 S.Ct. at 672, 28 L.Ed.2d at 134–135.

457 F.2d at 730.

[6] The sentence imposed was unconstitutional. The order of the district court denying habeas relief is reversed and the cause is remanded with directions to issue the writ unless within 30 days after the receipt of the mandate in the District Court the sentence is reformed in a manner not inconsistent with this opinion or the petitioner is allowed to replead.

REVERSED AND REMANDED WITH DIRECTIONS.

A true copy
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By: Clare F. Sachse
New Orleans, La. JUL 5 1977

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

TYRONE F. BARNETT,	*	
	*	CIVIL ACTION
v.	*	
	*	NO. 475-236
JOSEPH S. HOPPER, WARDEN	*	

O R D E R

This 2254 petition brought in forma pauperis shows that Barnett, as part of a negotiated plea bargain knowingly and voluntarily accepted by him, was sentenced to ten years imprisonment, to be probated on his payment of a $2,000 fine. He now contends that since he is an indigent, such a condition violates his constitutional right to equal protection of the law. The answer to his complaint is quite simple. There is an ancient maxim: "Volenti non fit injuria." The conclusion is inescapable that Barnett waived any constitutional right, not simply by pleading guilty, but by entering into the negotiated plea bargain. In substance, his complaint is not that the plea bargain was breached, but that it was honored.

Accordingly, the complaint is ordered dismissed.

So Ordered, this 9th day of July, 1976.

/s/ Anthony A. Alaimo
United States
District Judge

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

NO. 77-____

JOE S. HOPPER, WARDEN,
GEORGIA STATE PRISON,

Petitioner,

v.

TYRONE BARNETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I, B. Dean Grindle, Jr., Attorney of Record for the Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served three copies of the foregoing Petition for A Writ of Certiorari upon the Respondent by depositing same in a United States mailbox,

with first class postage prepaid, addressed to counsel of record as follows:

Mr. James C. Bonner, Jr., Esq.
University of Georgia
School of Law
409 North Lumpkin Street
Athens, Georgia 30601

This 26th day of September, 1977.

B. DEAN GRINDLE, JR.